

**REDACTED DECISION – DK# 09-318 RNFN – BY – GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on JULY 19, 2011,
ISSUED ON DECEMBER 29, 2011**

SYNOPSIS

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – The Petitioner was required to file a claim for refund within three years of the due date of the return, in respect of which the tax was imposed, determined by including any authorized extension of time for filing the return, or within two years of the date that they paid the tax for which they seek a refund, whichever expires later or if no return was filed, within two years from the time the tax or fee was paid, and not thereafter. *See* W. Va. Code Ann. § 11-10-14(l)(1) (West 2010).

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – Any petition for a refund not timely filed is not construed to be or constitute a moral obligation of the State of West Virginia for payment. *See* W. Va. Code Ann. § 11-14C-31(d) (West 2010).

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the taxpayer to show that it is entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010).

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – By not filing its claims for refund with the State Tax Commissioner before December 27, 2007, which was two years after the taxes were paid, the Petitioner failed to comply with West Virginia Code Section 11-10-14(l)(1).

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – The term “shall” as used by the Legislature, makes the statutory requirement mandatory rather than directory. Helton v. Reed, 219 W. Va. 557, 638 S.E.2d 160 (2006)

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – The West Virginia Office of Tax Appeals has no authority to disregard the express statutory requirement specifying the date by which a claim for refund must be filed.

BUSINESS FRANCHISE TAX AND CORPORATE INCOME TAX - STATUTE OF LIMITATIONS – Petitioner has failed to carry its burden of showing that it is entitled to a refund.

FINAL DECISION

The Corporate Income Tax Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or the “Respondent”), by letter dated July 15, 2009, informed the Petitioner that it had received corporate income and franchise tax returns from Petitioner; however, the refund in the amount of \$_____ had been decreased. The reason stated for the denial was that the refund claim for tax payments made in 2005 was not timely filed as to tax years 1999, 2000, 2001, and 2002; in violation of West Virginia Code Section 11-10-14(l)(1).

Thereafter, on September 14, 2009, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for refund. *See* W. Va. Code Ann. §§ 11-10A-8(2) and 11-10A-9 (West 2010).

Subsequently, a notice of hearing of the petition was sent to the parties and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. On January 15, 2004, an estimated billing for delinquent business franchise taxes was mailed to Petitioner for tax years 1999, 2000, 2001 and 2002, and for corporate net income taxes for tax years 2000 and 2001.

2. On December 27, 2005, Petitioner paid the sum of the subject billing in the amount of \$_____.

3. On July 15, 2009, Respondent notified Petitioner by letter that because tax returns for years 1999, 2000, 2001 and 2002 were not timely filed, that is by the due dates of each

return, the Petitioner only had two years from December 27, 2005, to file any refund claim, not three, because all the delinquent taxes for those years were paid on December 27, 2005, thereby reducing the amount of the requested refund.¹

4. On September 14, 2009, Petitioner timely filed with this Tribunal, a petition for refund.

5. Petitioner and the Respondent agreed that the facts presented about the amount of tax payments made and when returns were filed, were not in dispute.

6. None of the refund claims for tax years 1999, 2000, 2001 or 2002 were filed before December 27, 2007.

7. It is undisputed that the refund claims in this matter were filed more than two years after the tax payments were made.

DISCUSSION

The issue presented in this matter is whether the Petitioner filed its claim for refund within the limitations period established by West Virginia Code Section 11-10-14(l)(1) (West 2010), which provides:

(l) Limitation on claims for refund or credit.

(1) General rule

Whenever a taxpayer claims to be entitled to a refund or credit of any tax (or fee), additions to tax, penalties or interest imposed by this article, or any article of this chapter, or of this code, administered under this article, paid into the treasury of this state, the taxpayer **shall**, except as provided in subsection (d) of this section, file a claim for refund, or credit, within three years after the due date of the return in respect of which the tax (or fee) was imposed, determined by including any authorized extension of time for filing the return, or within two years from the date the tax, (or fee), was paid, whichever of the periods expires the later, or if

¹ The original return for year 1999 was filed December 12, 2003; the original returns for year 2000 were filed September 17, 2007. The original returns for year 2001 were filed September 17, 2007. The original return for year 2002 was filed November 6, 2007.

no return was filed by the taxpayer, within two years from the time the tax (or fee) was paid, and not thereafter.

W. Va. Code Ann. § 11-10-14(l)(1) (West 2010) (emphasis added)

This section required the Petitioner to file its claim for refund either within three years of the due date of the applicable corporate income and business franchise tax return, or within two years of the date that the corporate net income and business franchise taxes were paid. As stated above, the parties do not dispute that the refund requests in this matter **were not** filed within two years of the taxes being paid.²

The Petitioner's only argument in support of its appeal is that it was told by a Tax Department employee that the requested refunds would be granted automatically. Aside from its own testimony, the Petitioner presented no evidence regarding this purported conversation. While this Tribunal does not strictly follow the rules of evidence, it also does not generally give much probative weight to un-substantiated hearsay, offered expressly to prove the truth of the matter asserted. As such, the Petitioner has presented no evidence to suggest that the Tax Commissioner should be estopped from denying the Petitioner's untimely filed refund requests.

Because Petitioner did not file amended returns seeking refunds before December 27, 2007, it is clear that the Petitioner did not comply with the provisions of West Virginia Code Section 11-10-14(l)(1) and did not, therefore timely file its claim for refund with respect to tax years 1999, 2000, 2001, and 2002.

The statute specifies no grounds upon which the date certain set forth may be waived or disregarded. The statute makes no provision for any late filing of a claim for refund based on extenuating circumstances. On the contrary, by its use of the word "shall" the West Virginia

² While neither party argued the point at the evidentiary hearing in this matter, it is equally clear that the refund requests were not filed within three years of the original due dates for the returns in question.

Legislature has clearly indicated that the deadlines contained in Section 14(l)(1) are mandatory and West Virginia law on this point is well settled:

Based upon the rules of statutory interpretation of the law applicable to this case, a reversal of the circuit court's order is compelled. This Court has repeatedly said that the term "shall" as used by the Legislature, makes the statutory requirement mandatory rather than directory. *See*, Syl. Pt. 1, *Nelson v. West Virginia Public Employees Ins. BD.*, 171 W. Va. 445, 300 S.E. 2d 86 (1992) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."). *Accord* *State ex rel. Stump v. Johnson*, 217 W. Va. 773, 619 S.E.2d 246, 255 (2005). *See also* *State ex. Rel. Brooks v. Zakaib*, 214 W.Va. 253, 264-65, 588 S.E.2d 418, 429-30 (2003) ("Ordinarily, the word 'shall' has a mandatory, directory connotation." (citations omitted)); *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." Citations omitted)). Here, the applicable statutory language is clear and without ambiguity in expressing legislative intent and it should be given full force and effect.

Helton v. Reed, 219 W. Va. 557, 563 638 S.E.2d 160, 166 (2006) (Benjamin concurring).

The Petitioner has not provided this Tribunal with any contrary authority in support of its position. This Tribunal must follow the clear and express statutory requirements, and has no authority to disregard the same.

Neither the State Tax Commissioner, nor this Tribunal may extend the time for filing a claim for refund due to extenuating circumstances. Consequently, the petition for refund filed by Petitioner must be denied.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. The Petitioner was required to file a claim for refund within three years of the due date of the return, in respect of which the tax was imposed, determined by including any authorized extension of time for filing the return, or within two years of the date that it paid the tax for which it seeks a refund, whichever of the periods expires later or if no return was filed, within two years from the time the tax or fee was paid, and not thereafter. *See* W. Va. Code Ann. § 11-10-14(l)(1) (West 2010).

3. Any petition for a refund not timely filed is not construed to be or constitute a moral obligation of the State of West Virginia for payment. *See* W. Va. Code Ann. § 11-14C-31(d) (West 2010).

4. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the taxpayer to show that it is entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010).

5. By not filing its claims for refund with the State Tax Commissioner before December 27, 2007, which was two years after the taxes were paid, the Petitioner failed to comply with West Virginia Code Section 11-10-14(l)(1).

6. The term “shall” as used by the Legislature, makes the statutory requirement mandatory rather than directory. Helton v. Reed, 219 W. Va. 557, 638 S.E.2d 160 (2006)

7. The West Virginia Office of Tax Appeals has no authority to disregard the express statutory requirement, specifying the date by which a claim for refund must be filed.

8. Petitioner has failed to carry its burden of showing that it is entitled to a refund.

DISPOSITION

WHEREFORE, it is the Final Decision of the West Virginia Office of Tax Appeals that the Petitioner's petition for refund for the combined amount of \$_____ for tax years 1999, 2000, 2001 and 2002, should be and is hereby **DENIED**.